Petition

81-879

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD DEVOE GILLESPIE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of evidence seized by law enforcement officers following their entry into respondent's house, without a search warrant but with arrest warrants for fugitives who were reasonably believed to be on the premises, where the officers' entry occurred prior to this Court's decision in *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981).

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EDWARD DEVOE GILLESPIE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 650 F.2d 127. The opinion and order of the district court (App. B, *infra*, 7a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 30a) was entered on June 5, 1981. A petition for rehearing was denied on August 14, 1981 (App. D, *infra*, 31a). On October 5, 1981, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 12,

1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, respondent was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment.

1. Prior to trial, respondent moved to suppress evidence, including contraband seized from his residence and statements he made to law enforcement officers on the day of his arrest.

The district court found that on February 15, 1980, FBI agents and Gary, Indiana police officers went to respondent's house to execute arrest warrants for two individuals who were wanted for bank robbery and murder (App. B, *infra*, 7a-8a). The FBI agents had received information, which they regarded as reliable, that the two fugitives were present at respondent's residence (*id.* at 10a).

The officers did not obtain a search warrant before going to respondent's house. FBI Agent Allison knocked on the door, identified himself and announced his purpose. Respondent answered the door and gave permission to the officers to search for the fugitives. Accompanied by respondent, the officers conducted a room-by-room search of the house (App. B, *infra*, 8a). During this search, Agent Allison observed in plain view in a bedroom two plastic bags containing white powder and a vial containing brown powder; he also saw a mortar and pestle containing powder on the kitchen table (*id.* at 12a, 18a, 20a). Following the discovery of these items, respondent made several incriminating statements to the officers and consented to a second search of his house, which uncovered more than $3,500 in cash in the pocket of

a coat found in a bedroom closet (*id.* at 8a, 18a-19a, 20a-21a). Respondent was arrested and taken to the police station, where he made additional incriminating statements and consented to a further search of his house, during which the officers found 32 heroin capsules and drug paraphernalia (*id.* at 22a-23a, 24a-25a, 26a-27a).

2. The district court granted in part and denied in part respondent's motion to suppress (App. B, *infra*, 7a-29a). The court first concluded that the officers' entry into respondent's house was permissible under the Fourth Amendment even in the absence of a search warrant because the officers were armed with valid arrest warrants and acted on reliable information that the fugitives were present inside respondent's residence (*id.* at 9a-11a).[1] Accordingly, the court held that all of the contraband found in plain view during the search for the fugitives was admissible at respondent's trial (*id.* at 12a-13a). The court suppressed, as not justified by valid consent and as beyond the proper scope of a search for the fugitives, certain items, including $3,592 in cash and tin foil packets that the officers had discovered in coat pockets inside the house (*id.* at 20a-22a). However, the court held that certain other items, including the heroin capsules and drug paraphernalia, were admissible because they were found during a separate

[1] The district court noted (App. B, *infra*, 9a n.1) that this Court had recently held, in *Payton* v. *New York*, 445 U.S. 573 (1980), that the police must obtain an arrest warrant prior to entering a suspect's home for the purpose of making a routine felony arrest. The district court further noted, however, that the Court in *Payton* did not consider whether a search warrant was needed before the police could enter a third party's residence to arrest a fugitive. See 445 U.S. at 583. The entry into respondent's home took place several months prior to the decision in *Payton*.

search of the residence to which respondent voluntarily had consented (*id.* at 26a).

As to respondent's statements, the district court suppressed several statements made by respondent at his residence on the ground that they had not been preceded by *Miranda* warnings (App. B, *infra*, 13a-20a). The court held admissible several oral statements made by respondent after his arrival at the police station and following the waiver of his *Miranda* rights (*id.* at 22a-25a). Finally, the court suppressed a written statement because it was unclear whether respondent had requested an attorney before signing that statement (*id.* at 25a).

3. On June 5, 1981, the court of appeals reversed respondent's conviction (App. A, *infra*, 1a-6a). The court noted (*id.* at 2a) that after oral argument of respondent's appeal, this Court had decided *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981), which held that, absent consent or exigent circumstances, law enforcement officers must obtain a search warrant before searching for the subject of an arrest warrant in the residence of a nonsuspect third party.[2] The court of appeals held, "[i]n light of" *Steagald*, that the initial entry into and search of respondent's residence was unlawful because the officers had no search warrants but only arrest warrants for persons other than respondent, and because the entry could not be justified by either consent or exigent circumstances (*id.* at 2a-4a).[3] Consequently, the court concluded that all of the evidence, including the contraband observed in plain view dur-

[2] The court of appeals stated (App. A, *infra*, 2a n.3) that the Seventh Circuit had not previously passed upon the *Steagald* issue.

[3] We do not seek review of the court of appeals' determination that the entry was not supported by consent or exigent circumstances.

ing the initial search of the house and the statements made by respondent at the police station following his arrest, had to be suppressed as fruits of the unlawful entry (*id.* at 4a-6a).

The government petitioned for rehearing, arguing that the rule announced in *Steagald* should not be applied retroactively to suppress evidence obtained as a result of pre-*Steagald* entries into third-party premises to execute arrest warrants for fugitives. The petition for rehearing was denied (App. D, *infra*, 31a).

REASONS FOR GRANTING THE PETITION

In *Steagald* v. *United States*, *supra*, this Court held that, absent exigent circumstances or consent, the Fourth Amendment bars law enforcement officers from searching for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. This case presents the important question whether the principle established in *Steagald* should be applied retroactively. A closely related question concerning the retroactivity of *Payton* v. *New York*, 445 U.S. 573 (1980)—which imposed an arrest warrant requirement on officers seeking to enter a suspect's home to arrest him—is currently before the Court in *United States* v. *Johnson*, cert. granted, No. 80-1608 (Oct. 5, 1981).[4] Accordingly, the Court may wish to defer disposition of this petition pending its decision in *Johnson*.

Under settled principles, the exclusionary rule announced in *Steagald* should not be applied retroactively to suppress the evidence obtained following the entry into respondent's house. On February 15, 1980, the date of the entry at issue here, neither *Steagald* nor *Payton* had been decided. Moreover, at

[4] We are sending respondent a copy of our petition in *Johnson*.

the time of the entry, while the Seventh Circuit had not addressed the specific question that was ultimately decided in *Steagald* (see App. A, *infra*, 2a n.3),[5] it was, as this Court noted in *Payton* (445 U.S. at 575 n.4), one of the circuits that previously had upheld wholly warrantless arrest entries. See *United States ex rel. Wright* v. *Woods*, 432 F.2d 1143 (7th Cir. 1970). In these circumstances, no possible deterrent purpose would be served by excluding the fruits of pre-*Steagald* searches of third-party premises for the subjects of arrest warrants, since the law enforcement officers who conducted these searches did not know, and could not reasonably be charged with knowing, that their actions were proscribed by the Fourth Amendment. See *United States* v. *Peltier*, 422 U.S. 531 (1975). See also *United States* v. *Ross*, 655 F.2d 1159, 1182-1192 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting), cert. granted, No. 80-2209 (Oct. 13, 1981).

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[5] The courts of appeals that had ruled on this question at the time of the entry had reached different conclusions. Only the Third Circuit had explicitly stated that, absent consent or exigent circumstances, a search warrant was necessary in addition to an arrest warrant in order to enter the residence of a third party to effect an arrest. *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 928 (1974), cert. denied, 420 U.S. 909 (1975). The Ninth Circuit had reached a similar conclusion in *United States* v. *Prescott*, 581 F.2d 1343, 1347-1350 (1978), although the law enforcement officers in that case had neither search nor arrest warrants. However, the Fifth, Sixth and Tenth Circuits had adopted the position that a search warrant was not required if the officers had an arrest warrant and reason to believe that the subject of the arrest warrant was at the third party's residence. *United States* v. *Harper*, 550 F.2d 610, 612-614 (10th Cir.), cert. denied, 434 U.S. 837 (1977); *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977); *United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967).

As noted above, the issue of the retroactivity of *Payton* is currently before the Court in *United States* v. *Johnson*, *supra*. Because the decision in *Johnson* is likely to clarify the law with respect to the application of the exclusionary rule to suppress evidence on the basis of Fourth Amendment principles announced after the particular search and seizure in question, we submit that the Court should postpone its consideration of this petition pending its decision in *Johnson*. If the Court determines in *Johnson* that *Payton* is not to be applied retroactively, there would be no reason for a different outcome here, and, accordingly, the Court should grant this petition, vacate the judgment of the court of appeals, and remand this case to that court for further consideration in light of *Johnson*. If, on the other hand, the Court in *Johnson* affirms the judgment of the Ninth Circuit, plenary review in this case may be warranted, depending on the particular basis for the Court's decision in *Johnson*.

CONCLUSION

The Court should defer disposition of this petition for a writ of certiorari pending its decision in *United States* v. *Johnson*, and should then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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NOVEMBER 1981

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-2124

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EDWARD DEVOE GILLESPIE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. H CR 80-23—JESSE E. ESCHBACH, *Judge*

ARGUED APRIL 9, 1981—DECIDED JUNE 5, 1981

Before SWYGERT and SPRECHER, *Circuit Judges*, and HOFFMAN, *Senior District Judge.**

PER CURIAM. Defendant Edward Gillespie appeals his conviction on one count of possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He contends that certain items of physical evidence introduced against him at trial were

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* The Honorable Walter E. Hoffman, United States Senior District Judge for the Eastern District of Virginia, sitting by designation.

unconstitutionally seized. After oral argument in this case, the Supreme Court issued a decision in *Steagald* v. *United States*, No. 79-6777, 49 U.S.L.W. 4418 (April 21, 1981), which held that possession of an arrest warrant for a third party does not justify a search of one's home. In light of that decision, we reverse defendant's conviction.

The facts of the two cases are virtually identical. In each case, federal officers [1] arrived at the defendant's home armed with arrest warrants for fugitives whom the officers had good cause to believe were hiding there. An initial search was undertaken of the house, in which the fugitives were not discovered but contraband [2] was seen by the officers. In each case, two further searches were undertaken, during which more contraband was found and seized. Both defendants filed motions to suppress the seized evidence. The district court in this case carefully sifted through the evidence against Gillespie, and, in a thorough opinion, suppressed much of the testimonial evidence but admitted the physical evidence now in question.[3] After a two-day trial, the jury convicted Gillespie of possession of heroin with intent to distribute. Gillespie was sentenced to ten years' imprisonment.

The Supreme Court in *Steagald, supra*, held that an arrest warrant for a third party did not justify

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[1] The officers in *Steagald* were agents of the Drug Enforcement Administration. Here they were FBI agents accompanied by Gary, Indiana police officers.

[2] In *Steagald* the contraband was cocaine. In this case it was heroin.

[3] The district court, of course, did not have the benefit of the *Steagald* opinion. While other circuits had split on the issue of applicability of arrest warrants in searches, this circuit had not considered the question. *See Steagald, supra*, at n. 3.

entry into a home of persons not named in the warrant. The Court noted that the purpose of a warrant is to subject to detached judicial scrutiny the conflicting interests of the police and of the party to be arrested or whose home is to be searched. The issuance of an arrest warrant in the case was based upon probable cause to believe that the named fugitive had committed a felony. The reasonableness of entry into Steagald's home, however, was never subjected to judicial scrutiny. "Thus, while the warrant in this case may have protected [the fugitive] from an unreasonable seizure, it did absolutely nothing to protect [Steagald's] privacy interest in being free from an unreasonable search of his home." *Id.* at 4421. The decision to enter Steagald's home was only that of the federal officers involved, and such judicially untested decisions are not reliable enough to satisfy the Fourth Amendment. Because two distinct interests were involved—that of Steagald and that of the fugitive—and because the arrest warrant protected only the fugitive's, "the search of [Steagald's] home was no more reasonable from [Steagald's] perspective than it would have been if conducted in the absence of any warrant." *Id.*

The entry into Gillespie's home was similarly illegal "absent consent or exigent circumstances." *Id.* The Government does not argue any exigent circumstances but does contend that Gillespie agreed to the search. The circumstances surrounding the officers' entry into the Gillespie home indicate that any consent could not have been freely and voluntarily given.[4] Five FBI agents and Gary police officers arrived at Gillespie's door armed with shotguns and revolvers, while three or four other officers main-

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[4] *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968).

tained a visible position outside to catch any fugitives who might attempt to flee the house. When Gillespie answered the door, the officers identified themselves and told him they were looking for three fugitives who they had been informed were hiding in his home. It is unclear from the record whether the lead FBI agent was already inside the door when Gillespie said the officers could look for the fugitives, but even if the agent were outside, Gillespie could only have felt he had no choice but to let in the officers. As noted, they were heavily armed, and they carried their weapons in a "ready" position. They frisked Gillespie as soon as they entered the house, and they then forced him to walk in front of them, with their shotguns cocked, as they searched through the house, room by room.[5] No "essentially free and unrestrained choice" is possible under such circumstances.[6]

Some physical evidence was taken during this first search, but most of the heroin that was introduced against Gillespie was seized during the second and third searches of his home. Gillespie freely consented to these later searches, but the heroin recovered during them must nevertheless be suppressed. That evidence was entirely the product of the first unconstitutional search. "The exclusionary prohibition extends as well to the indirect as the direct products of [illegal] invasions." *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963). If the officers had not been inside the house illegally, they would never have known that

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[5] The question of consent was not explicitly raised in the *Steagald* decision, but the circumstances there were identical. The DEA agents in *Steagald* were also armed with their weapons drawn, and they frisked both men they found outside the house as well as the woman who answered the door.

[6] *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973).

Gillespie had any heroin there. If knowledge of a criminal violation is gained from a source independent of illegal police conduct, it may be utilized as any other fact. *See Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). In this case, however, all the officers' knowledge of Gillespie's illegal activities was derived from their initial unconstitutional search. Therefore, none of the physical evidence against Gillespie discovered on the day of the search may be introduced against him.

The testimonial evidence obtained in Gillespie's confession the same day is just as tainted as the physical evidence. "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation—whether such evidence be tangible . . . or confessions or statements of the accused obtained during an illegal arrest and detention." *United States* v. *Crews*, 445 U.S. 463, 470 (1980). Because the probable cause for Gillespie's arrest, during which he made the confession, resulted directly from the evidence seized during the illegal search, his detention was also illegal. The Supreme Court in *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), defined the factors to be considered "in determining whether the confession is obtained by exploitation of an illegal arrest: [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct." *See also Dunaway* v. *New York*, 422 U.S. 200, 218 (1979). While the illegal arrest was not purposeful here as it was in *Brown* and in *Dunaway*,[7] the other circumstances in those

[7] In both *Brown* and *Dunaway*, the police officers involved admitted they made the arrests without probable cause in the hope that the defendant might confess while in custody.

cases are similar to the present case. As the district court found in this case, there was not much time between his arrest and his interrogation at the police station.[8] More importantly, no intervening events of any significance occurred. While the atmosphere at the police station may have been calm, as the district court also found, Gillespie was under the direct control of the police from the time of the original illegal search at gunpoint through his confession. As the Supreme Court noted in *Dunnaway*, a confession may be voluntary under Fifth Amendment standards but still be inadmissible under the Fourth Amendment when the arrest is illegal.[9] Under the circumstances in this case, we hold Gillespie's testimonial evidence to be inadmissible.[10]

Defendant's conviction is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[8] He was arrested and taken to the police station between 3:30 and 4:00; his questioning lasted from approximately 4:15 to 6:00.

[9] *Dunaway* v. *New York*, 442 U.S. 200, 216-219 (1979); *see also Brown* v. *Illinois*, 422 U.S. 590, 604 (1975). The fact that Gillespie had signed a *Miranda* waiver similarly bears only on the question of voluntariness and does not affect our Fourth Amendment analysis.

[10] In *United States* v. *Crews*, 445 U.S. 463 (1980), as in *United States* v. *Ceccolini*, 435 U.S. 268 (1978), testimonial evidence of a third party was held to be sufficiently independent for the illegal arrest to be admissible. In this case, however, we are concerned with the testimony of the subject of the illegal arrest. *Brown* and *Dunaway* therefore control our decision here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

No. HCR 80-23

UNITED STATES OF AMERICA, PLAINTIFF

v.

EDWARD DEVO GILLESPIE, DEFENDANT

Filed May 13, 1980

MEMORANDUM OF DECISION AND ORDER

This cause is before the court on defendant's motion to suppress, filed April 22, 1980. An evidentiary hearing on the motion was held at the United States District Court in Hammond, Indiana, on May 1, 1980 at 1:00 p.m. The United States filed a memorandum in opposition to the motion on May 6, 1980. This memorandum of decision and order contains this court's findings of fact and conclusions of law. For the reasons set forth below, the motion will be granted in part and denied in part.

Defendant is charged with possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Defendant seeks to suppress certain items seized from his residence on February 15, 1980; he also seeks to suppress oral statements made by him at his residence on that day, as well as oral and written statements made by him at the Gary, Indiana, police station on the same day. On February 15, 1980 at approximately 2:00 p.m. defendant was at his rented residence at 263 Rutledge St., Gary,

Indiana. Several other adult males were also at the residence. A party of three FBI agents and more than three Gary police officers came to defendant's residence at 2:00 p.m. to execute an arrest warrant for fugitives wanted for bank robbery and murder. The officers had no search warrant. The officers were heavily armed, and held their guns ready when they knocked on defendant's door. FBI Special Agent Allison did knock and did identify himself and his purpose; defendant answered the door and gave permission to the officers to search for the fugitives. A few officers entered while others covered the exterior of the house. Accompanied by defendant, the officers conducted a room-by-room search of the house. The officers held their guns ready for use, anticipating that the fugitives were armed and dangerous. The fugitives were not, in fact, at the Gillespie residence, though they had been a few hours earlier. During the search, the officers observed apparent contraband items in plain view. Defendant received no *Miranda* warnings at his residence. After the initial search for the fugitives and after defendant made statements concerning the contraband, defendant consented to a thorough search of his residence. That search uncovered additional items, including a large amount of cash, which the United States seeks to use as evidence. Between 3:30 p.m. and 4:00 p.m., defendant was taken to the Gary police station. There he received *Miranda* warnings and made oral and written statements. Also while at the Gary police station, he consented to a second search of his residence, which uncovered additional items, including contraband. After that search, and after requesting a lawyer, defendant made a final oral statement.

EXECUTION OF AN ARREST WARRANT AT THE RESIDENCE OF A THIRD PARTY

Most courts that have considered the question have held that a search warrant is not necessary to execute an arrest warrant on the premises of a third party.[1] *See, e.g., United States* v. *Gaultney*, 606 F.2d 540 (5th Cir. 1979); *United States* v. *Harper*, 550 F.2d 610 (10th Cir. 1977); *United States* v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 and 430 U.S. 983 (1977); *United States* v. *James*, 528 F.2d 999 (5th Cir. 1976), *cert. denied*, 429 U.S. 959 (1977). *But see Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). One court has formulated the following standard:

> [W]hen an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose

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[1] This question was not dealt with in the recent Supreme Court decision of *Payton* v. *New York*, 48 U.S.L.W. 4375 (1980), which held that police are prohibited from entering a suspect's home in order to make a routine felony arrest of the suspect without an arrest warrant or consent. The Court stated that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.* at 4383. However, the court noted, the factual circumstances did not "raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect." *Id.* at 4378. Nor did the circumstances present the question of the authority of officers with an arrest warrant to enter the home of a third party.

> of arresting the suspect. . . . The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a search warrant. When one says "probable cause," therefore, one also says either "magistrate" or "exigent circumstances." Reasonable belief embodies the same standards of reasonableness but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

545 F.2d at 421. The officers who came to the residence of defendant held a valid arrest warrant for Lillian Marie Davis and James Edward Allen, frequently referred to as "Bongo Sam." (Government exhibits 1 and 2). Federal warrants for bank robbery and state warrants for murder were outstanding for these fugitives. FBI Special Agent Allison had received from an informer what the agent regarded as reliable information that the two fugitives were at the Gillespie residence on February 15, 1980. Defendant has not challenged the reliability of that information. In a case involving events similar to those that occurred at the Gillespie residence, one court has reached the following conclusions:

> A search warrant was not necessary to execute an arrest warrant on the premises of a third party; "and although the person sought is not in the dwelling the actor is privileged to use

> force if he reasonably believes him to be there and enters in the exercise of a privilege to make a criminal arrest under a valid warrant. . . ." *Rodriguez* v. *Jones*, 5 Cir., 473 F.2d 599, 606 (1973, cert. den., 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007; *United States* v. *Jones*, 5 Cir. 475 F.2d 723, 729 (1973); *United States* v. *McKinney*, 6 Cir., 379 F.2d 259 (1967).[25] The officers' information from an informant whom they had previously found to be reliable that the fugitive was at the premises in question was an adequate basis for a reasonable belief by them that the suspect was there. . . . After the officers entered the house, they had the right to seize relevant articles in plain view while carrying out those purposes. *Harris* v. *United States*, 1968, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067; *Coolidge* v. *New Hampshire*, 1971, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564;. . . . The fact that the persons being looked for were not in the house did not render the entry invalid nor require suppression of evidence seized while in plain view. *United States* v. *Hofman*, 5 Cir., 488 F.2d 287 (1974). The scope of the search was tied to and justified by the exigencies of the situation.

528 F.2d at 1017-18. Although defendant gave the officers permission to search his residence for the fugitives, consent was not required for execution of the arrest warrant. Though the fugitives were not on the premises when the officers arrived, they had been there a few hours earlier. Once inside the premises, the officers could seize any contraband items in plain view in places that could conceal a fugitive.

ITEMS SEIZED DURING THE FIRST SEARCH OF THE RESIDENCE

During the initial search through the house for the fugitives, Agent Allison observed in plain view in a bedroom two plastic bags containing a white powder and a vial containing a brown powder; he observed a mortar and pestle on the kitchen table. These items are admissible. Under the circumstances of this case, the "plain view" exception to the requirement of a search warrant extends to items in plain view in places large enough to conceal a fugitive:

> "The exception is limited to protect against a general police canvassing of the homes of all of the suspect's acquaintances. There must be a reasonable belief that the person named in the arrest warrant is inside; furthermore, the entry is valid only for the purpose of executing the arrest and not for conducting a general search."

United States v. *Cravero*, 545 F.2d 406, 421 n.2 (5th Cir. 1976). Further, "[o]ne explanation for not requiring a search warrant to enter a third person's home to execute an arrest is that there is no need to particularize the search—the arrest warrant has already done that." *Id.* at 421 n. 1. The items in plain view in a bedroom on a dresser were legally observed by Agent Allison. He testified that he had the Gary police take charge of the items found on the table. It is not clear when the items in the bedroom were literally seized; nevertheless, Agent Allison's initial legal sighting makes them admissible. Agent Allison testified that the items on the kitchen table included a tinfoil packet found in a coat on the table. The tinfoil packet is not admissible. The arrest warrant authorized the officers only to search for the bodies of

the fugitives, not to search the pockets of clothing found at the residence of a third party. The government has not contended that consent was given to search this coat on the table. Agent Allison's testimony indicates that this packet was found before any alleged consent was given. Officers later found other items not in plain view after allegedly receiving consent of the defendant to search. These items included money found in a coat pocket in defendant's bedroom. The question whether these items are admissible will be discussed below. The question of the validity of any consent must await consideration of the question whether custodial interrogation occurred.

STATEMENTS MADE BY DEFENDANT AT HIS RESIDENCE

Miranda v. *Arizona*, 384 U.S. 436 (1966) requires that certain warnings be given prior to custodial interrogation. Custodial interrogation and arrest are two entirely different concepts. The *Miranda* decision defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. In a footnote that has caused considerable confusion, the Court added: "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Id. at* 444 n.4. Although given some significance in the past, the "focus" test has been rejected or at least reduced in significance. *See Beckwith* v. *United States*, 425 U.S. 341 (1976); *United States* v. *Jimenez*, 602 F.2d 139 (7th Cir. 1979). *See also United States* v. *Bastone*, 526 F.2d 971, 977-78 (7th Cir. 1975). That an investigation has focused on an individual does not necessarily

establish that interrogation of that individual is custodial. At most, such focus may provide an indication that interrogation is custodial, in that the focus on an individual might support an inference that officers questioning the individual would be less likely to permit the individual to leave. *See* 602 F.2d at 145.

The question whether custodial interrogation occurred has been regarded as the most difficult and frequently encountered issue raised by *Miranda*. See 602 F.2d at 143. Courts have decided the question on a case-by-case basis, considering the totality of the circumstances. *See U.S.* v. *McCain*, 556 F.2d 253 (5th Cir. 1977); *Carder* v. *Maxwell*, 298 F.Supp. 1056 (S.D. Ohio 1969). Some courts have considered subjective factors in determining whether custodial interrogation occurred: "(1) a probable cause to arrest; (2) the subjective intent of the interrogators to hold the suspect; (3) the subjective belief of the suspect concerning the status of his freedom; and (4) whether the investigation has focused on the suspect." *United States* v. *Micieli*, 594 F.2d 102, 105 (5th Cir. 1979).

Consideration of subjective factors has been criticized in a passage worth quoting at some length:

> The [Miranda] Court could scarcely have intended the issue whether the person being interrogated had "been taken into custody or otherwise deprived of his liberty in any significant way" to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be

> significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses. On the other hand, a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned. The test must thus be an objective one. Clearly the Court meant that *something* more than official interrogation must be shown. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source. While the Court's language in *Miranda* was imprecise, doubtless deliberately so, it conveys a flavor of some affirmative action by the authorities other than police interrogation.

United States v. *Hall*, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

An objective test has been described as follows:

> In this circuit an objective reasonable man test is employed in determining whether a person is in custody. The factors to be considered are the language used to summon him, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and pressure exerted to detain him. If the person reasonably believes that he cannot leave freely, he is considered in custody and a *Miranda* warning is required.

United States v. *Luther*, 521 F.2d 408, 410 (9th Cir. 1975). *See also United States* v. *Curtis*, 568 F.2d 643 (9th Cir. 1978); *Lowe* v. *United States*, 407 F.2d 1391 (9th Cir. 1969). The United States Court of Appeals for the Seventh Circuit has rejected the subjective test; that court in *United States* v. *Jimenez*, 602 F.2d at 145 quoted with approval the following from *Borodine* v. *Douzaniz*, 592 F.2d 1202, 1206 n.2 (1st Cir. 1979): "[N]either subjective intent of the officer and defendant nor whether the authorities have focused on the defendant are the relevant considerations. . . ." Within the First Circuit custodial interrogation exists if there is some objective manifestation that the defendant was deprived of his freedom in any significant way. *See United States* v. *Balsamo*, 468 F.Supp. 1363 (D. Me. 1979). By citing the rejection of the subjective test within the First Circuit, the United States Court of Appeals for the Seventh Circuit apparently adopts an objective test of custodial interrogation.

A subjective test would, in any event, have little utility in the situation under current consideration. The defendant did not testify explicitly whether he believed he was free to leave when law enforcement officers talked to him at his residence. Nor did the law enforcement officers specify at what time they formed the intent to arrest the defendant. This court will consider the objective manifestations that defendant was deprived of his freedom in a significant way before he was actually arrested and taken to the police station. It is clear that custodial interrogation occurred in defendant's residence; the only question is precisely at what point in time it occurred.

It is established that custodial interrogation can occur outside of a police station. *See Orozco* v. *Texas*, 394 U.S. 324 (1969); *Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F.2d 397 (7th Cir. 1975); *Brown* v. *Beto*, 468 F.2d 1284 (5th Cir. 1972); *United States* v. *Nash*, 414 F.Supp. 1213 (S.D. Tex. 1976). Custodial interrogation can occur even in the "familiar surroundings" of a defendant's own home. It is true that outside a police station custodial interrogation will be found to occur only under special circumstances. See 602 F.2d at 144. But surely special circumstances were present in this case. From the outset of this encounter, defendant's residence hardly resembled the "familiar surroundings" to which he was accustomed. As soon as officers appeared at his door, the defendant found himself in a "police-dominated" situation. See 407 F.2d at 1394. Defendant was confronted by several armed officers and led them on a painstaking, step-by-step search of his own residence, opening closet doors and pulling aside a shower curtain at the direction of an officer. Defendant was told to move slowly, taking each step only when told to do so. That the officers understandably followed such practices for their own protection does not diminish the effect upon defendant. Whether the officer's guns were pointed at defendant or slightly off to one side, as in this case, is immaterial. A somewhat analogous case is *Brown* v. *Beto*, in which the defendant was awakened at the rear of his store by armed officers who forced him to watch while they meticulously searched for narcotics. When an officer found a sack and asked the defendant, "What is this?" The defendant replied, "It's heroin. You've got me this time." 468 F.2d at 1285. The court found custodial

interrogation and held the statement inadmissible. The facts in that case differ from those in the case under consideration in that in *Brown* the officers' initial purpose was to search for drugs allegedly owned by the defendant, while in this case, the officers' initial purpose was to arrest a third party. However, in this case, once officers found what appeared to be narcotics and drug paraphernalia while accompanying defendant at gunpoint, defendant could reasonably believe that he had been confronted with supposed evidence of guilt and that he was being deprived of his freedom in a significant way. *See also United States* v. *Castellana*, 488 F.2d 65 (5th Cir.), *aff'd in part, rev'd in part*, 500 F.2d 325 (5th Cir. 1974) (en banc).

After the initial search for the fugitive throughout the house, Special Agent Allison and defendant sat at a kitchen table. Mr. Allison cleared the table of a mortar and pestle containing a light tan powder. Defendant asked what would be done with those items. Mr. Allison asked what they were. Defendant allegedly responded that they were "stash, maybe $175 - $200 worth." Agent Allison responded that the Gary police would take care of it; Agent Allison at that time was concerned only with arresting the fugitives. Gary Police Officer Sak asked defendant if he could search through the house. Although Agent Allison told defendant he did not have to consent, defendant nevertheless consented. Again defendant asked what would be done with his stash, mentioning that it was all he had left. Agent Allison responded that he did not want to talk about it; he wanted only to talk about the fugitives. Defendant said he knew only that they had been there a few hours earlier. Agent Allison warned defendant he could run the

risk of prosecution for harboring a fugitive. A little later, Agent Allison indicated he could pay for information concerning the fugitives. Defendant stated that one of the fugitives had brought some stash that morning, and indicated where he thought the fugitives might be. Officer Sak then returned to the kitchen with a "baggie" size plastic bag containing a light-brown powder, and asked defendant the identity of the substance. Defendant allegedly responded with a street term for narcotics. Defendant received no *Miranda* warnings prior to any of these statements.

Miranda makes an exception for spontaneous statements even though a defendant may be in custody:

> The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, [footnote omitted] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 1630. Defendant's inquiry to Agent Allison as to what would be done with the items on the table was not made in response to police initiative, and is admissible despite the absence of prior warnings. However, Agent Allison's inquiry as to the nature of the items cannot be dismissed as merely a response to defendant's spontaneous question, even though Allison would have to know what the items

were before he could say what would be done with them. Agent Allison's response was in form a question. More importantly, his response was likely to elicit from defendant information that could be incriminating. Agent Allison is an experienced investigative veteran. Although he testified that when he first saw the bags and vial in the bedroom, he had no reason to suspect that they were narcotics, the possibility must have occurred to him. A similar possibility must have occurred to him concerning the mortar, pestle, and powder on the kitchen table. Defendant's expressed concern over what would happen to the items should have further alerted Agent Allison to the possibility that the items were contraband and that defendant was their owner. Under the circumstances, Agent Allison should have and must have realized that inquiry as to the nature of those items might elicit an incriminating response. His inquiry should have been preceded by *Miranda* warnings. It should be noted that Agent Allison did warn defendant of the risk of prosecution for harboring a fugitive, and did inform him that he need not consent to a search. Whatever the reason for the failure to give *Miranda* warnings, defendant's response to Agent Allison's inquiry is inadmissible, as are all subsequent statements made by defendant at his residence to Agent Allison, Officer Sak, or any other law enforcement personnel.

INVALID CONSENT TO SEARCH THE RESIDENCE

Agent Allison and Officer Sak testified that Officer Sak obtained the consent of the defendant before searching the bedroom. Defendant's testimony indicates that consent was obtained only after Officer

Sak had first searched the bedroom, which had already been searched by the FBI agents for the fugitives. An internal report of the Gary police written on the day of the search indicates that Officer Sak searched the bedroom before obtaining consent. (See Defendant's Exhibit c). The report indicates that after consent was obtained, Officer Sak searched the bedroom a second time, finding $3,592.00 in cash in a coat pocket in a closet. Consent is invalid if "tainted" by illegal police action. *See United States* v. *Sanchez-Jaramillo*, No. 78-2649 (7th Cir. April 22, 1980). This defendant's consent to the search could have been influenced by two factors. First, the officers had already legally found apparent contraband items in plain view. For all the defendant knew, officers might have already found the cash in the coat pocket before his consent was asked. Consent was not asked until the defendant had been sitting at the table with Agent Allison for several minutes; during this period, police officers were throughout the house. As mentioned above, officers had found a tinfoil packet in a coat on the table before consent was given. An arrest warrant does not authorize a search of coat pockets in the residence of a third party. Although defendant did not likely know the criteria distinguishing legal and illegal searches, he reasonably could have believed that officers had already illegally searched coat pockets before asking consent, and apparently some searching of this type had taken place. Under the circumstances, defendant could have concluded that refusal to consent to a further search would be futile. To the extent that plaintiff's consent was influenced by the prior occurrence of illegal searches, that consent is invalid. In this case, the conclusion is inescapable

that the oral consent to Officer Sak for a search of the house was ineffective as a matter of law.

The second factor that could have influenced plaintiff's consent is that he had already made damaging statements in response to custodial interrogation without *Miranda* warnings. Since he had already made admissions concerning contraband that had been found, refusal to consent to a search for additional contraband would seem futile. It is true that defendant denies making any incriminating statements. However, this court has found that defendant did make damaging statements that are inadmissible because they were in response to custodial interrogation without the required warnings. The court finds that defendant's consent to search was tainted by illegal prior police activity, both in regard to illegal search and questioning without warnings. The consent given by defendant at his residence to Officer Sak was therefore invalid. If consent had been valid, items not in plain view, including the $3,592.00, would be admissible. But since consent was not valid, the only admissible items are those that were in plain view in places that could have concealed a fugitive; consent to search under the circumstances of this case was not necessary to make these items admissible.

STATEMENTS MADE BY DEFENDANT AT THE GARY POLICE STATION

Law enforcement officers had first come to defendant's residence about 2:00 p.m., February 15, 1980. At about 3:30-4:00 p.m., the same day, defendant was taken to the Gary police station under arrest. Between 4:00 p.m. and 6:30 p.m., defendant made statements to Gary police officers after receiving *Miranda*

warnings. The question is whether these statements were tainted by the prior statements defendant had made at his residence, statements this court has found inadmissible because of lack of *Miranda* warnings. The question is to be answered according to the following standards:

> Prior [inadmissible] custodial interrogation does not automatically make inadmissible subsequent in-custody statements given during interrogation after appropriate warning. Westover v. United States, 384 U.S. 436, 495-496, 86 S.Ct. 1602, 1639, 16 L.Ed.2d 694 (1966); Harney v. United States, 407 F.2d 586, 589 (5th Cir. 1969). Rather, the facts and circumstances must be examined carefully to determine the existence and extent, if any, of a causal relationship between the earlier unconstitutional interrogation and the statement obtained in the later interrogation following Miranda warnings. . . . The ultimate issue is whether the federal authorities were beneficiaries of pressure applied during the earlier, illegal custodial interrogation. . . .
>
> In *Westover*, supra, the Supreme Court relied largely on a test of proximity both in time and in place to decide this issue. There the federal interrogation was conducted immediately following the unconstitutional questioning by state authorities in the same police station and under the same compelling circumstances as the state interrogation. The Court concluded that the federal authorities had indeed been the beneficiaries of the impermissible state conduct, but added:

> We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.

384 U.S. at 496, 86 S.Ct. at 1639.

United States v. *Harris*, 381 F.Supp. 1095, 1100 (E.D. Pa. 1974).

This defendant was removed in place from the residence where he made the illegally obtained statements. Although Gary police were present at both the residence and the station, Officer Beckham, who questioned defendant at the station, had not been present at the residence. The removal in time between the two interrogations was not great. Defendant was arrested at his residence and taken to the station between 3:30 and 4:00 p.m., Officer Beckham began talking to defendant at approximately 4:15 p.m. The court finds that the interrogation at the station was sufficiently removed from the earlier interrogation not to have been tainted by it. Officer Beckham talked with defendant for some time over a cup of coffee before actual interrogation was commenced. The atmosphere was sufficiently calm and lacking in coercion to dissipate the effect of the search of his residence at gunpoint defendant had experienced a few hours earlier and the brief interrogation without warnings. Therefore the oral state-

ments made by defendant after *Miranda* warnings at the Gary police station between approximately 4:00-6:20 p.m. on February 15, 1980 are admissible.

At the station, officers reduced some of defendant's oral statements to a written page (Defendant's exhibit B). The last question on that page was "What was the white powder which was confiscated? And did it belong to you? Defendant answered, "It was heroin. Well I think I better stop and wait for my Lawyer." That defendant asked for a lawyer could itself be prejudicial to a jury. Further, although the request for a lawyer appears at the end of the written statement, it is not certain that this sequence corresponds exactly to the sequence of oral statements on which the written statement is based. Defendant's Exhibit B, the written statement signed by defendant, is therefore inadmissible.

During defendant's interrogation at the Gary police station, Officer Garcia took handwritten notes. The notes contain an account of defendant's statements, and a hearsay account of the second search, at which Officer Garcia was not present. The notes also indicate that defendant stated he did not wish to talk any more and that he wanted to see a lawyer. The notes contain an account of additional statements made by defendant after those requests. Defendant's Exhibit D, the notes taken by Officer Garcia during the interrogation of defendant at the Gary police station, is inadmissible as part of the Government case in chief. The court leaves open the question whether the notes would be admissible for impeachment or corroboration of testimony of a trial witness; that question will be ruled upon at trial should the need arise.

VALID CONSENT TO AN ADDITIONAL SEARCH

While defendant was being interrogated by Officer Beckham at the police station, he was informed that another person arrested at his residence had said additional controlled substances were still at the residence. Defendant consented to an additional search (Government Exhibit 4). The court finds this consent valid, since it was obtained during the course of properly conducted questioning. Defendant was influenced to consent by the fact that another person who had been at his residence had provided certain information to the police. There has been no showing of any impropriety in the interrogation of this other person. After obtaining this consent, officers returned to defendant's residence and seized a bottle of suspected narcotics in a bedroom, spoons and a sifter in the kitchen, and 32 heroin capsules in the bathtub. These items are admissible.

This court rejects any possible argument that during this legal search police would have inevitably discovered items illegally seized during the earlier search following invalid consent. The items illegally seized during the earlier search were the tinfoil packet in a coat on the kitchen table, and the $3,592.00 found in a pocket of a coat in a bedroom closet. The United States Court of Appeals for the Seventh Circuit has apparently endorsed the inevitable-discovery doctrine. *See United States ex rel. Owens* v. *Twomey*, 508 F. 2d 858, 868 (7th Cir. 1974). *See also United States* v. *Carsello*, 578 F.2d 199, 204 (7th Cir. 1978). However, it has not been shown that the doctrine is applicable to the facts of this case. The ownership of the coat on the table has not been established. If it be-

longed to one of the persons who was not arrested, it might not have been at the house when the police returned. Nor has it been established that the second search was a thorough search of the entire premises. It is true that the form defendant signed at the police station consented to "a complete search of my premises" (Government Exhibit 4). Officer Beckham and Officer Guzman conducted the search. Officer Beckham's testimony indicated that he directed Officer Guzman to make a thorough search while Officer Beckham walked from room to room. However, Officer Beckham's testimony also indicated that Officer Guzman's search focused specifically on specific items expected to be found in specific places as a result of interrogation of defendant and another arrestee at the police station. Officer Beckham's description of the second search simply does not specifically support the conclusion that the second search would have inevitably discovered cash in a coat pocket in a closet. The tinfoil packet and cash found in coat pockets remain inadmissible.

After the officers returned from the second search, Officer Beckham questioned defendant about the 32 heroin capsules found in the bathtub. Defendant indicated that he had sold them earlier in the day to another person. This statement is inadmissible. It was made after defendant had already requested assistance of counsel (Defendant's Exhibit B). The request had been made to an officer other than Officer Beckham, and Officer Beckham did not know of the request when he asked about the capsules. Nevertheless, Officer Beckham was bound by the request for counsel. *See United States* v. *Wedra*, 343 F.Supp. 1183, 1188 (S.D. N.Y. 1972).

ORDER

Defendant's motion to suppress, filed April 22, 1980, is hereby granted in part and denied in part. The plastic bags containing white powder and the vial found in the northwest bedroom in plain view during the initial search of the house are hereby held admissible. The mortar and pestle containing powder found during the same search are hereby held admissible. The tinfoil packet found in a coat pocket on the kitchen table during the initial search is hereby held inadmissible. The $3,592.00 found in a pocket of a coat in a bedroom closet is hereby held inadmissible. Any other items not identified at the hearing and not in plain view that may have been found during the search following the invalid consent are hereby held inadmissible. Statements made by defendant at his residence without prior *Miranda* warnings are hereby held inadmissible. Defendant's inquiry to Agent Allison as to what would be done with items on the kitchen table is hereby held admissible. All statements made by defendant at his residence after Agent Allison asked, "What is it?" are hereby held inadmissible. The oral statements made by defendant at the Gary police station are hereby held admissible. The written statement signed by defendant at the Gary police station is hereby held inadmissible. The notes taken by Officer Garcia during interrogation at the police station are hereby held inadmissible as part of the Government case in chief. The court does not now rule on the question of their admissibility for impeachment or corroboration of testimony of trial witnesses. Items found during the search of the residence following valid consent given by defendant at the police station are hereby held admissible.

These items include a bottle of suspected narcotics found in a bedroom, spoons and a sifter found in a kitchen, and 32 heroin capsules found in the bathtub. The statement made by defendant concerning the 32 capsules after defendant had requested an attorney is hereby held inadmissible.[2]

Entered this 13th day of May, 1980.

/s/ Jesse E. Eschbach
United States District Judge

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[2] Obviously, the admissibility of the evidence not suppressed pursuant to this order will require the usual showing at trial to support the admission of like evidence.

APPENDIX C

Per Curiam Opinion

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 5, 1981

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WALTER E. HOFFMAN, *Senior District Judge* *

No. 80-2124

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

EDWARD DEVOE GILLESPIE, DEFENDANT-APPELLANT

JUDGMENT—ORAL ARGUMENT

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

No. 80-Cr-23 Judge Jesse E. Eschbach

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, in accordance with the opinion of this Court filed this date.

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* The Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia is sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 14, 1981

Before

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WALTER E. HOFFMAN, *Senior District Judge* *

No. 80-2124

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

EDWARD DEVOE GILLESPIE, DEFENDANT-APPELLANT

On Petition for Rehearing

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause.

IT IS ORDERED that the said petition for rehearing be, and the same is hereby DENIED.

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* The Honorable Walter E. Hoffman, United States Senior District Judge for the Eastern District of Virginia, is sitting by designation.

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Opposition

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

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NO: 81-879

UNITED STATES OF AMERICA, PETITIONER

-vs-

EDWARD DEVOE GILLESPIE

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES H. GRADDICK, ATTORNEY
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO: 81-879

UNITED STATES OF AMERICA, PETITIONER

-vs-

EDWARD DEVOE GILLESPIE

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Appellant, by and through his Attorney, CHARLES H. GRADDICK, files his reply brief to the Governments Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of appeals is reported at 650 F.2d 127.

JURISDICTION

The case was argued on April 9, 1981 and judgment of the Court of appeals was entered on June 5, 1981, A Petition for rehearing was denied on August 14, 1981. On October 5, 1981, Justice Stevens extended the time within which to file a Petition for a Writ of Certiorari to and including November 12, 1981. The appellant was given until February 3, 1982 within which to file a reply brief to Petitioners Petition for a Writ of Certiorari.

STATEMENT

On February 15, 1980 at approximately 2:00 p.m. appellant, Edward Gillespie was in his home at 263 Rutledge Street, Gary Indiana with several other men. At the above time a party of three Federal Bureau of Investigation agents and approximately five or six Gary Police Officers arrived at appellants home to execute arrest warrants for fugitives wanted for bank robbery and murder. The officers who had no search warrants were heavily armed with shotguns and handguns held ready, when F.B.I. agent, Tom Allison, knocked on Gillespie's door. Agent Allison who led the party, identified himself and his purpose when the appellant opened the door. Allison armed with a shotgun then stepped inside the doorway. He ordered all the occupants but Gillespie out of the house when he noticed one man leave the first floor for the basement. The occupants were searched spread eagle style against the front wall of the house by waiting armed officers. Then Allison frisked the nervous appellant and told him of his intent to search his house for fugitives. Gillespie said "you can look for them" and was then told to guide the agents by walking in front of the agent's shotgun. More officers entered the near hour long search but no fugitives were found.

After the agents finished looking for fugitives, Gillespie was told to sit down for an interview at his dining room table where a mortar and pestle was located. The agent cleared this and some foil wrapped heroin taken from a coat beside the pestle from the table. This act prompted the appellant to ask what would be done with those items. Without giving Miranda Warnings, Allison asked "What is it?". Gillespie replied that it was his "stash", or personal supply of drugs, he needed it and it was worth no more than two hundred dollars. The agent replied that he was only interested in talking about

the fugitives and that he would turn the stash over to the Gary Police Department. Allison then offered to pay Gillespie for information on the whereabouts of the fugitives.

During this interview, Gary Police Officers, Sak and Peters approached Gillespie. Sak asked permission to "look around". Before Gillespie could respond to Sak, Agent Allison advised him that he could refuse to allow Sak and Peters to search. However, Gillespie replied "you have already searched it, you may as well go ahead now and search it even more." Officer Sak did that and returned with two "baggie" sized plastic bags and a brown pill bottle. He seized from the northwest bedroom. Without any Miranda warnings, Sak asked Gillespie what the items contained. Gillespie replied "heroin". Gillespie further incriminated himself during this interview when he told agent Allison, with no Miranda warnings that at least one of the fugitives visited him that morning and obtained some drugs from him.

Approximately two hours after the Officers entered his home, Gillespie was transported to the Gary Police Station on charges of possessing and distributing narcotics. Fifteen minutes later Gillespie was being questioned in the Gary Police Department interrogation room by Sergeant Jerome Beckham of the Gary Police Department. Beckham gave Gillespie a cup of coffee and a Miranda Waiver form which Gillespie signed. During this interrogation, Gary Police Officer Dennis Smith appeared to advise Beckham that an informant told him that still more controlled substances were located in Gillespie's home.

In response, Sergeant Beckham, obtained Gillespie's signature on a prepared consent to search form. Then Beckham took Officers Ronald Fleming and John Guzman to Gillespie's home.

They met Mrs. Gillespie there and informed her of their mission. She did not protest and the officers had her verify her husbands consent over the telephone.

During this third search, thirty two heroin capsules were seized from a bathtub which had been searched earlier. More heroin was seized from the northwest bedroom which also had been searched earlier by five officers. In addition, a sifter and spoons were seized from the kitchen which had also been searched earlier. All these items plus those found during the initial two, two hour searches were held admissible after a suppression hearing before the United States District Judge Jesse Esbach on May 1, 1980.

On May 22, 1980, after a two day jury trial, appellant was convicted of Possession of Heroin with the intent to distribute in violation of 21 U.S.C. § 841 (A) (I).

On June 5, 1981, the Court of Appeals for the Seventh Circuit reversed appellants conviction.

REASONS FOR DENYING THE PETITION

In the instant case, the question of retroactive application has been raised by the government. Perhaps the most pertinent question pertaining to the issue that the government raises, is whether or not Gillespie meet the tests as determined in United States V. Peltier, 422 U.S. 531 (1975).

The circumstances surrounding this case all took place in Indiana. Accompanying the agents of the F.B.I. were several Gary Indiana Police Officers. The State of Indiana long has held

that a search of any individual's home without a search warrant and absent exigent circumstances is unreasonable under Indiana Law and the Fourth Amendment to the United States Constitution Ludlow v. State, 314 N.E.2d 730 (1974). Further, it has long been the position of this court that such searches are unreasonable. Steagald v. United States _____U.S._____,68 L.Ed 2d 38 at 45, 101 S. Ct_____No. 79-6777.

Ludlow, Supra, was much more direct, however, and represents current law in the State of Indiana. The argument cannot be made therefore, that the officers acted under color of some authority or custom, one of the requirements of Peltier, supra. The appellant takes the position that the F.B.I. agents were or should have been no less aware of the requirement to obtain a search warrant before entering the premises of a third party to effect an arrest warrant. This fact becomes especially relevant when you consider that Officer Sak made a request to search the house and Agent Allison advised the appellant that he could refuse such a request to search. This case is easily distinguished, therefore, from the facts in Payton v. N.Y. 445 U.S. 573 (1980) where the police acted under statutory authority.

Further, the court of appeals had much authority upon which to reach the identical conclusion as that which this court reached less than two months earlier, and which the appellant had argued before the Court of appeals twelve (12) days prior to the courts decision in Steagald.

CONCLUSION

It is the appellant contentions that the tests providing for a denial of retroactive application do not exist in the instant case, as the police had every reason to believe that they were acting in bad faith, particularly, in light of the actions,with regard to the searches, of the police while at Gillespie's residence. Accordingly, this petition should be denied.

RESPECTFULLY SUBMITTED,

Charles H. Graddick
ATTORNEY FOR APPELLANT

Frederick D Wh
CO-ATTORNEY FOR APPELLANT

CHARLES H. GRADDICK, ATTORNEY
504 BROADWAY SUITE 828
GARY, INDIANA 46402
(219) 882-0808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO: 81-879

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD DEVOE GILLESPIE

CERTIFICATE OF SERVICE

I, certify that on the 3rd day of February, 1982, service of a true and complete copy of the REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT was made upon the UNITED STATES SUPREME COURT with a copy of same to REX LEE, SOLICITOR GENERAL herein by depositing the same in the United States Mail in envelopes properly addressed to each of them with sufficient first class postage affixed.

Charles H. Graddick

CHARLES H. GRADDICK, ATTORNEY
504 BROADWAY SUITE 828
GARY, INDIANA 46402
(219) 882-0808

NO: 81-879

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
FEB 8 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA, THE PETITIONER

-vs-

EDWARD DEVOE GILLESPIE

M O T I O N

to proceed on appeal in Forma Pauperis

Comes now the Appellee by counsel and now shows this court as follows:

1. That the appellant in the above entitled matter is without money, means, property or income and that because of his poverty is unable to make the costs as required by law or to give security therefor, as evidenced by his Affidavit, hereto attached as Exhibit "A".

2. Said appellant further states that he believes he is entitled to the redress he asks for in the within proceedings and respectfully prays the court for an order permitting him to commence such action without being required to make such payment of costs or to give security therefore.

WHEREFORE, appellant prays this court to allow him to appeal in Forma Pauperis.

RESPECTFULLY SUBMITTED,

Charles H. Graddick
ATTORNEY FOR APPELLANT

CHARLES H. GRADDICK, ATTORNEY
504 BROADWAY SUITE 828
GARY, INDIANA 46402
(219) 882-0808

NO: 81-879

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

-vs-

EDWARD DEVOE GILLESPIE

AFFIDAVIT OF APPELLANTS COUNSEL TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Comes now Charles H. Graddick, Attorney at Law and now states that I represented as private and retained counsel the appellant during the trial in the United States District Court, Hammond Division, for the Northern District of Indiana.

That I also represented the appellant in his trial at the Seventh Circuit Court of appeals, during which time my representation was without benefit of pay by my client; and I did not seek leave to proceed in forma pauperis.

The reasons stated above was that my client exhausted his funds and that my interest in the case at that time was such that I did not mind representing him to the conclusion of his appeal in the Seventh Circuit Court of appeals without trying to tap public sources for payment of services.

That the appellant has been unemployed due to his incarceration and has no funds with which to pay costs or attorney fees in this action.

Further Affiant sayeth not.

Charles H. Graddick
ATTORNEY

STATE OF INDIANA
COUNTY OF LAKE

SUBSCRIBED AND SWORN TO BEFORE ME A NOTARY PUBLIC FOR SAID STATE THIS 29TH DAY OF JANUARY, 1982.

9-23-85
MY COMMISSION EXPIRES

NOTARY PUBLIC

CHARLES H. GRADDICK, ATTORNEY
504 BROADWAY SUITE 828
GARY, INDIANA 46402

NO: 81-879

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

-vs-

EDWARD DEVOE GILLESPIE

AFFIDAVIT TO ACCOMPANY MOTION FOR
LEAVE TO APPEAL IN FORMA PAUPERIS

I, EDWARD DEVOE GILLESPIE, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor. I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. ARE YOU PRESENTLY EMPLOYED ?

ANSWER: NO, HAVE BEEN INCARCERATED FOR THE LAST YEAR. My last employment was in 1978 when I worked for the City of Gary.

2. HAVE YOU RECEIVED WITHIN THE PAST 12 MONTHS ANY INCOME FROM A BUSINESS PROFESSION OR OTHER FORM OF SELF EMPLOYMENT, OR IN THE FORM OF RENT PAYMENTS, INTEREST, DIVIDENDS, OR OTHER SOURCES ?

ANSWER: NONE

3. DO YOU OWN ANY CASH OR CHECKING OR SAVINGS ACCOUNTS ?

ANSWER: NONE

4. DO YOU OWN ANY REAL ESTATE, STOCKS, BONDS, NOTES, AUTOMOBILES, OR OTHER VALUABLE PROPERTY.

ANSWER: NONE

5. LIST THE PERSONS WHO ARE DEPENDENT UPON YOU FOR SUPPORT AND STATE YOUR RELATIONSHIP TO THOSE PERSONS .

ANSWER: I provide support whenever possible for my Wife and Five minor children namely; Letroy born 9-8-62; Geodice born 10-4-63; James, born 9-4 64; Maurice born 8-14-65; and Shannoyn born 3-3-69.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Edward N. Gilkey, Jr.
APPELLANT

STATE OF INDIANA
COUNTY OF LAKE

SUBSCRIBED AND SWORN TO BEFORE ME A NOTARY PUBLIC IN AND FOR SAID STATE AND COUNTY, THIS 31 DAY OF JANUARY, 1982

9-23-85
MY COMMISSION EXPIRES

Bessie D. Myers
NOTARY PUBLIC

RESIDENT OF LAKE COUNTY, INDIANA

BESSIE D. MYERS
NOTARY PUBLIC STATE OF INDIANA
LAKE CO.
MY COMMISSION EXPIRES SEPT 23 1985
ISSUED THRU INDIANA NOTARY ASSOC

CHARLES H. GRADDICK, ATTORNEY
504 BROADWAY SUITE 828
GARY, INDIANA 46402
(219) 882-0808

IN THE SUPREME COURT OF THE UNITED STATES

NO. 81-879

UNITED STATES OF AMERICA,
The Petitioner.

-vs-

EDWARD DEVOE GILLESPIE.

AFFIDAVIT

Comes now Attorney Frederick T. Work, and for his Affidavit alleges and states as follows:

1. That he caused to be mailed by first-class mail, postage prepaid, and deposited in the United States Post Office, all matters pertaining to the above captioned cause, and that such mailing took place on the 3rd day of February, 1982, directed to the Office of the Clerk of the Supreme Court of the United States, Washington, D. C. 20543.

2. That the affiant is premitted to practice before the Supreme Court of the United States of America.

Further affiant saith not.

Frederick T Work

FREDERICK T. WORK

SUBSCRIBED and SWORN to before me this 3rd day of February, 1982.

Bertha Sneed

NOTARY PUBLIC - BERTHA SNEED
RESIDENT: LAKE COUNTY, INDIANA
My Commission Expires: May 24, 1983

LAW OFFICES
FREDERICK T. WORK
OFESSIONAL CORPORATION
1816 BROADWAY
GARY, INDIANA 46407

IN THE SUPREME COURT OF THE UNITED STATES

NO. 81 879

UNITED STATES OF AMERICA,

The Petitioner.

-vs-

EDWARD DEVOE GILLESPIE.

Comes now Frederick T. Work and requests leave of court to enter into the within cause of action on behalf of Edward Devoe Gillespie.

Leave granted. So ordered.

ENTER: _____

JUDGE

LAW OFFICES
FREDERICK T. WORK
PROFESSIONAL CORPORATION
1818 BROADWAY
GARY, INDIANA 46407